MICHIGAN SUPREME COURT

Office of Public Information

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FOR IMMEDIATE RELEASE

PRISONERS' CLASS ACTION SUIT AGAINST GOVERNOR, STATE TO BE ARGUED BEFORE MICHIGAN SUPREME COURT NEXT WEEK; PLAINTIFFS CLAIM STATE'S INDIGENT DEFENSE SYSTEM IS INADEQUATE, UNCONSTITUTIONAL

LANSING, MI, April 7, 2010 – A group of prisoners who claim that the state's public defender system violates their constitutional rights will have their arguments heard by the Michigan Supreme Court next week.

The plaintiffs in *Duncan v State of Michigan* filed a class action suit on behalf of all indigent criminal defendants in three Michigan counties, arguing that the current system, in which counties pay for public defender services at trial, is inadequate and poorly funded. They seek a court order to compel the state to provide funding, oversight, and training for public defense lawyers. Among the issues in the case: whether the trial court properly certified the plaintiff's class action lawsuit and whether the courts can order the relief that the plaintiffs are seeking.

Also before the Court is *Brooks v Starr Commonwealth*; at issue is whether the defendant, which operates a medium-security detention facility for juvenile offenders, can be held liable for the death of a man who was murdered by a youth who escaped from the facility. A state statute, MCL 803.306a(1), requires a facility to "immediately" notify police or the sheriff of a public ward's escape. The plaintiff contends that the facility – whose staff searched for the escaped youth for almost two hours before notifying the county sheriff – violated the statute and is negligent as a matter of law. But the trial court judge dismissed the plaintiff's claim of negligence per se, stating that, although the defendant had violated the statute, the plaintiff could not show that the facility owed her or the murdered man a duty; the judge noted that the killing took place 11 days after the youth's escape. In a split opinion, the Court of Appeals reversed and reinstated the negligence per se claim, with the majority stating that a jury should decide whether the plaintiff had a claim.

The remaining eight cases involve issues of constitutional, criminal, family, governmental immunity, procedural, and tax law.

Court will be held on **April 13 and 14** in the Supreme Court's courtroom on the sixth floor of the Michigan Hall of Justice in Lansing. Oral arguments will begin at **9:30 a.m**. on **April 13**; on **April 14,** oral arguments will begin at **9:00 a.m**. The Court's oral arguments are open to the public.

Please note: the summaries that follow are brief accounts of complicated cases and may not reflect the way that some or all of the Court's seven justices view the cases. The attorneys may also disagree about the facts, the issues, the procedural history, or the significance of their cases. Briefs in the cases are online at http://www.courts.michigan.gov/supremecourt/Clerk/MSC_orals.htm. For further details about the cases, please contact the attorneys.

Tuesday, April 13
Morning Session

IN RE HANSEN, MINOR (case no. 139507)
Attorney for petitioner Department of Human Services: Colin B. MacBeth/(231) 723-7518
Attorney for respondent Billy Joe Hansen: Vivek S. Sankaran/(734) 763-5000
Attorney for guardian ad litem Genevieve Brookelyn Hansen, Minor: Mark A. Otto/(231) 723-0707
Attorney for amicus curiae Department of Attorney General: Jennifer L. Gordon/(313) 833-3777
Trial Court: Manistee County Circuit Court
At issue: The respondent-father was incarcerated three months before his daughter's birth. When the child was about two weeks old, her mother, who had been arrested on drug charges and jailed, arranged to have the father's sister and brother-in-law care for the child. The father's earliest release date is in 2021, when his daughter will be 13 years old. Is the father's incarceration for a period exceeding two years an automatic ground for termination of his parental rights? If not, did the family court err in finding that the father failed to provide proper care and custody when the child's mother, who herself was under the jurisdiction of the family court and unavailable to care for the child, placed her with the father's relative? If termination was appropriate, was it in the best interests of the child?
Background: Genevieve Hansen was born while her father, Billy Joe Hansen, was in jail awaiting trial on a number of felony traffic charges; 15 days after Genevieve's birth, her mother was arrested on drug charges and jailed. At that point, Genevieve's mother arranged for Genevieve to be cared for by Hansen's sister and brother-in-law, Kelly and Paul Woroniak. Hansen pled guilty to two counts of operating a vehicle while intoxicated causing death. He was sentenced to two consecutive prison terms of 7 to 15 years. His earliest release date is August 7, 2021, when Genevieve will be 13 years old.

The Department of Human Services filed a petition asking the family court to take jurisdiction over Genevieve. Eventually, after Genevieve's mother failed to comply with a case plan, the trial court terminated her parental rights, as well as Hansen's. As grounds for terminating Hansen's parental rights, the judge cited MCL 712A.19b(3)(c)(i) (the conditions that led to the adjudication continue to exist and there is no reasonable likelihood they will be rectified in a reasonable time considering the child's age) and (h) (the parent is imprisoned for more than two years, has not provided for the child's proper care and custody, and there is no reasonable expectation the parent will be able to do so within a reasonable time, considering the child's age). The trial court added that there was "no showing" that termination would be "contrary to the best interests of Genevieve . . . ."

Hansen appealed to the Court of Appeals, which affirmed in a published opinion. The Court of Appeals agreed with the trial court that there were statutory grounds for terminating Hansen's parental rights. Noting the length of Hansen's sentence, the appellate court concluded that he could not provide proper care and custody for Genevieve within a reasonable time;

Genevieve would be deprived of a normal home with Hansen for a period exceeding two years, the appellate court said. The Court of Appeals rejected Hansen's claim that he provided proper care and custody for his child while incarcerated, noting that it was Genevieve's mother, not Hansen, who facilitated Genevieve's placement with the Woroniaks, and that Hansen had provided only "minimal financial support" to his sister. The Court of Appeals agreed with Hansen that the trial court applied the wrong standard when it made its best-interests determination; the trial court stated that there was no showing that termination was contrary to Genevieve's best interests, rather than affirmatively finding that termination was in Genevieve's best interests. But the Court of Appeals concluded that the error was harmless, and that substantial justice would be served by affirming the trial court's ruling. The record was "replete with evidence that would justify" finding that termination was in Genevieve's best interests, the appeals court held. Hansen appeals.

GADIGIAN v CITY OF TAYLOR (case no. 138323)
Attorney for plaintiff Diane Gadigian: James J. Raftery/(248) 538-2400
Attorney for defendant City of Taylor: Marcelyn A. Stepanski/(248) 489-4100
Attorney for amicus curiae Michigan Municipal League, Michigan Townships Association, State Bar Public Corporation Law Section and Michigan Municipal League Liability and Property Pool: Gerald A. Fisher/(248) 514-9814
Attorney for amicus curiae Michigan Township Participating Plan and Municipal Insurance Alliance: Thomas R. Meagher/(517) 371-8161
Trial Court: Wayne County Circuit Court
At issue: The plaintiff was injured when she fell on a public sidewalk, tripping over sidewalk slabs of different heights. She sued the city, and presented evidence that the city knew of the condition of the sidewalk for at least two years and that the difference in the height of the sidewalk slabs, while less than two inches, created a trip hazard. MCL 691.1402a(2) states that "A discontinuity defect of less than 2 inches creates a rebuttable inference that the municipal corporation maintained the sidewalk . . . in reasonable repair." In this case, the Court of Appeals held that the plaintiff's evidence was sufficient to overcome MCL 691.1402a(2)'s "reasonable repair" inference. Did the Court of Appeals correctly interpret MCL 691.1402a(2)? What evidence must a plaintiff present to rebut the reasonable repair inference?
Background: Diane Gadigian tripped and fell on a pubic sidewalk in Taylor, fracturing her kneecap and chipping a tooth. The adjoining sidewalk slabs were each slightly elevated on opposite sides of the sidewalk, but neither elevation by itself was more than two inches. The city admitted that the sidewalk had been in its present condition for at least three years. Gadigian filed this lawsuit, alleging that the city negligently maintained the sidewalk. Her lawsuit relies on the highway exception to governmental immunity, MCL 691.1402. The statute provides that "A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency." The city moved for summary disposition, noting that MCL 691.1402a(2) states that a "discontinuity defect of less than 2 inches creates a rebuttable inference" that the sidewalk was maintained in reasonable repair. The city argued that Gadigian had failed to rebut this inference because the height difference between the two slabs was less than two inches. Gadigian presented an affidavit from an expert witness, who opined that the sidewalk defect violated the city's own ordinance regarding sidewalk repair and that the raised

slab was a "trip hazard." When the discontinuities on each side of the sidewalk slab were added together, they totaled more than two inches, the expert witness observed. The trial court denied the city's motion for summary disposition and the Court of Appeals affirmed in a published opinion. The appeals court held that the Legislature's choice of the phrase "rebuttable inference" in MCL 691.1402a(2) meant only that the jury was free to infer that the sidewalk was in reasonable repair, not that the city was entitled to a presumption of reasonable repair. In this case, the Court of Appeals held, Gadigian presented affidavits showing that the city knew of the condition of the sidewalk for at least two years and that the height differential, while less than two inches, was a trip hazard due to the fact that it was not apparent to a casual observer. The appeals court held that this evidence was sufficient to rebut the statutory inference and create a jury-submissible question of fact. The city appeals.

LANSING SCHOOLS EDUCATION ASSOCIATION, et al. v LANSING BOARD OF EDUCATION, et al. (case no. 138401)
Attorney for plaintiffs Lansing Schools Education Association, MEA/NEA, Cathy Stachwick, Penny Filonczuk, Elizabeth Namie, and Ellen Wheeler: Michael M. Shoudy/(517) 349-7744
Attorney for defendants Lansing Board of Education and Lansing School District: Margaret M. Hackett/(517) 484-8000
Attorney for amicus curiae Michigan Manufacturers Association: Kristin B. Bellar/(517) 318-3100
Attorney for amicus curiae National Wildlife Federation: Neil S. Kagan/(734) 887-7106
Attorney for amicus curiae Michigan Association of School Boards: Brad A. Banasik/(517) 327-5900
Trial Court: Ingham County Circuit Court
At issue: Several Lansing school teachers alleged that they had been physically assaulted by students, who were suspended for their conduct but not expelled. The teachers and their union sued the board of education and the school district, seeking enforcement of the Revised School Code: "If a pupil enrolled in grade 6 or above commits a physical assault at school against a person employed by . . . the school board and the physical assault is reported to the school board . . . by the victim . . . then the school board . . . shall expel the pupil from the school district permanently, subject to possible reinstatement . . . ." MCL 380.1311a(1). The trial court granted the defendants' motion for summary disposition, reasoning that the defendants have the discretion to determine whether a physical assault has occurred. In a published opinion, the Court of Appeals affirmed, holding that the plaintiffs lacked standing to sue. Did the Court of Appeals err in concluding that the plaintiffs lacked standing? Was *Lee v Macomb County Board of Comm'rs*, 464 Mich 726 (2001), correctly decided?
Background: Teachers Cathy Stachwick, Penny Filonczuk, Ellen Wheeler, and Elizabeth Namie are employed by the Lansing School District, which is governed by the Lansing Board of Education. The teachers are members of the Lansing Schools Education Association, MEA/NEA. The four teachers were the victims of assaults by their sixth-grade-or-higher students. Stachwick was hit in the face by a wristband with metal spikes, which a student threw at her; Filonczuk and Wheeler were struck with chairs, and Namie was slapped hard on the back. In each case, the student who committed the assault was suspended, but not expelled. A provision of the Revised School Code, MCL 380.1311a(1) provides that "If a pupil enrolled in grade 6 or above commits a physical assault at school against a person employed by . . . the

school board and the physical assault is reported to the school board, school district superintendent, or building principal . . ., then the school board . . . shall expel the pupil from the school district permanently, subject to possible reinstatement . . . .” MCL 380.1311a(12)(b) defines “physical assault” as “intentionally causing or attempting to cause physical harm to another through force or violence.” The teachers and their union sued the board of education and the school district; the plaintiffs sought a declaratory judgment that the defendants violated the law by failing or refusing to expel the students. The plaintiffs also sought a writ of mandamus, compelling the defendants to perform their legal duties as described in Section 1311a(1).

The defendants responded with a motion for summary disposition, in which they argued that the plaintiffs lacked standing to assert their claims. Standing is a constitutional principle that requires courts to consider only cases in which the claimant has suffered or is about to suffer a concrete injury. The defendants argued that the plaintiffs lacked standing because they have no legally protected interest in the defendants’ decisions to suspend rather than expel students. The defendants also contended that Section 1311a(1) does not create a private right of action. Finally, the defendants argued that the defendant school district possesses the sole discretionary authority over student disciplinary matters.

The trial court granted the defendants’ motion. Analogizing the situation to that of a prosecutor who refuses to issue a warrant, the court opined that the decision whether a physical assault had occurred is within the defendants’ discretion. The judge agreed with the plaintiffs that expulsion under Section 1311a is “mandatory, if [defendants] determine that an assault occurred.” But the court did not wish “to become a monitor of the Lansing School Board activities.” The Court of Appeals affirmed the trial court’s ruling in a published opinion, holding that the plaintiffs had neither constitutional nor statutory standing to bring this suit. “It is . . . conjectural to assume, in light of the conduct set forth in the complaint, that the mere suspension of the students, as opposed to their expulsion, would place the teachers’ safety in jeopardy. There is no allegation that the students pose a continuing threat . . . .” The Court of Appeals held that the plaintiffs could not establish that they were injured by the school board’s determination to suspend rather than expel the students. Moreover, the appellate panel said, “[n]othing in the plain language of MCL 380.1311a(1) indicates that a teacher may bring a cause of action to ensure that a student is expelled from school.” The plaintiffs appeal. They argue in part that the Supreme Court should overrule its earlier decision in *Lee v Macomb County Board of Commissioners*, 464 Mich 726 (2001). The plaintiffs contend that the standing definition adopted by the Court in *Lee* is not consistent with the Michigan constitution and should be discarded in favor of the “prudential standing” that Michigan courts had previously applied.

Tuesday, April 13
Afternoon Session

PEOPLE v MARDLIN (case no. 139146)
Prosecuting attorney: Timothy K. Morris/(810) 985-2400
Attorney for defendant Frederick James Mardlin: F. Martin Tieber/(517) 339-0454
Attorney for amicus curiae Prosecuting Attorneys Association of Michigan: Terrence E. Dean/(231) 724-6435
Trial Court: St. Clair County Circuit Court
At issue: The defendant was convicted of two counts of arson. At trial, the judge allowed the prosecutor to introduce evidence that, on four other occasions, property owned or possessed by

the defendant had burned. The defendant appealed, and the Court of Appeals held that the evidence of the other fires was irrelevant. It reversed the defendant's convictions, and remanded the case for a new trial. Is the evidence of the other fires relevant, under the "doctrine of chances," to disprove that the fire in this case was natural or accidental? Is anything more than the mere occurrence of the other fires necessary for the admission of such evidence?

Background: Frederick Mardlin's home caught on fire and was significantly damaged. A Michigan State Police fire inspector investigated and concluded that the fire was started intentionally. Mardlin was the chief suspect; he was the last person in the house at the time, and he and his family were having financial difficulties. It was also discovered that, in the past 12 years, there had been four fires involving Mardlin's home and vehicles. The prosecutor charged Mardlin with arson of a dwelling and arson of insured property. She gave notice that she intended to introduce evidence of the prior fires, to demonstrate a pattern of behavior. Michigan Rule of Evidence 404(b) provides that evidence of "other crimes, wrongs, or acts is not admissible to prove" a defendant's character, but it may be admissible for other purposes such as to show a common "scheme, plan, or system in doing an act" or the "absence of mistake or accident . . . ." Evidence of other crimes, wrongs, or acts is admissible under MRE 404(b)(1) if the evidence is (1) offered for a proper purpose, i.e., one other than to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74-75 (1993). Mardlin objected to the evidence of the other fires; he argued that he was not the owner of one of the vehicles, and that the other fires were dissimilar to the fire in this case, so they did not demonstrate a common scheme or plan under MRE 404(b). But the trial judge ruled that the evidence would be admissible; after a seven-day jury trial, a jury convicted Mardlin of both counts of arson. He was sentenced to three to 20 years in prison for arson of a dwelling, concurrent to a one to 10 year prison term for arson of insured property.

Mardlin appealed to the Court of Appeals, arguing that his convictions should be reversed. Among other things, he contended that the evidence of the other fires should not have been admitted at trial. The Court of Appeals agreed. In an unpublished per curiam opinion, the Court of Appeals held that the prosecutor had failed to establish the relevance of this evidence. The characteristics of the previous fires were not sufficiently similar to the charged offense to establish that Mardlin acted according to a common plan, scheme, or system, the Court of Appeals concluded. Likewise, in the absence of evidence showing that any of the previous fires were intentionally set, they were not logically relevant to the question of whether this fire was intentionally set, the appellate court said. The Court of Appeals also rejected the prosecutor's argument that evidence of the prior fires was admissible to establish defendant's motive or identity. Concluding that the trial court's error in admitting the evidence was not harmless, the appeals court vacated Mardlin's convictions and remanded the case for a new trial. The prosecutor appeals.

MAWRI v CITY OF DEARBORN (case no. 139647)
Attorney for plaintiff Mohamed Mawri: Ernest F. Friedman/(248) 350-9440
Attorney for defendant City of Dearborn: William H. Irving/(313) 943-2035
Attorney for amicus curiae John A. Braden: John A. Braden/(231) 924-6544
Attorney for amicus curiae Michigan Municipal League, Michigan Municipal League Liability and Property Pool, and Michigan Townships Association: Rosalind H. Rochkind/(313) 446-5522

Attorney for amicus curiae Michigan Association for Justice: Victor S. Valenti/(248) 355-5555
Attorney for amicus curiae Michigan Defense Trial Counsel: Sandra J. Lake/(517) 333-0306
Trial Court: Wayne County Circuit Court
At issue: The plaintiff sued the city of Dearborn after he slipped and fell on an icy sidewalk. In his pre-suit notice to the city, the plaintiff's attorney stated that the plaintiff fell "in the area of 5034 Middlesex," although evidence suggests that the fall actually took place in front of 5026 Middlesex. The city filed a motion for summary disposition, arguing that the lawsuit should be dismissed because the pre-suit notice did not give the exact location of the plaintiff's fall. The trial court denied the motion, but the Court of Appeals reversed and ordered summary disposition in favor of the city under MCL 691.1404. Was plaintiff's pre-suit notice adequate? Was the city entitled to summary disposition?
Background: Mohamed Mawri slipped and fell on an icy sidewalk near his home at 5034 Middlesex in Dearborn. A police report and photographs suggest that the exact site of Mawri's fall was in front of 5026 Middlesex, near a tree planted close to the sidewalk. Before suing a governmental entity for injuries caused by a defective highway, a plaintiff must send a pre-suit notice of "the occurrence of the injury and the defect" within 120 days after the injury occurred, MCL 691.1404. The statute also provides that "The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant." To satisfy this statutory requirement, Mawri's attorney sent a letter to the city of Dearborn: "Please be advised that I represent Mohamed Mawri for injuries he sustained when he fell on a defective side-walk on March 2nd, 2006 in the area of 5034 Middlesex, Dearborn Michigan. It is my understanding that since this fall, the City has repaired the area. As indicated, my client fell due to the defective side-walk, fracturing his right hip, necessitating surgery. Please consider this statutory notice. If you need any further information please do not hesitate to contact me." Mawri then sued the city. The city filed a motion for summary disposition, asking the trial court to dismiss the lawsuit. Among other things, the city argued that the notice given by Mawri's attorney was legally insufficient under MCL 691.1401. The trial court denied the city's motion, but in an unpublished per curiam opinion, the Court of Appeals reversed the trial court and ruled that the city was entitled to summary disposition. The panel noted that the slip and fall did not occur at 5034 Middlesex, but rather next door, on the sidewalk in front of 5026 Middlesex. The Court of Appeals held that this misstatement violated MCL 691.1404(1)'s requirement that the "exact" location of the injury be identified. The panel also concluded that the letter Mawri sent to the city did not describe the "nature of the defect" as required by MCL 691.1404(1). "A description of a defect's 'nature' would have to be more than simply calling it 'defective,' " the Court of Appeals held. Mawri appeals.

FIRST INDUSTRIAL, L.P. v DEPARTMENT OF TREASURY (case no. 139748)
Attorney for plaintiff First Industrial, L.P.: Michele L. Halloran/(517) 853-1601
Attorney for defendant Department of Treasury: Bruce C. Johnson/(517) 373-3203
Lower Court: Court of Claims
At issue: The plaintiff reduced its single business tax liability for tax years 1999 and 2000 by applying a business loss deduction carryover transferred from a subsidiary company that had ceased operations in Michigan but not in other jurisdictions. The Department of Treasury disallowed the deduction based on longstanding policy that permits the deduction only if the transferring company ceases all operations. The plaintiff paid the tax under protest and sued for a

refund in the Court of Claims, contending that it was entitled to the business loss deduction, or in the alternative is entitled to an equivalent deduction called the capital acquisition deduction. The trial court granted the Department's motion for summary disposition. The Court of Appeals reversed with respect to the business loss deduction, but affirmed regarding the capital acquisition deduction. Did the Court of Appeals properly decide the case?

Background: First Industrial, L.P., is a limited partnership that purchases commercial land and buildings, rents the properties to clients, and then sells the buildings. First Industrial was a 99 percent limited partner in First Industrial Financing Partnership. In 1998, FIFP distributed its Michigan assets to First Industrial. FIFP then completely discontinued operations in Michigan, although it continued operations outside the state.

Under the Single Business Tax Act, net business loss is deducted from the taxpayer's tax base. If the taxpayer has a loss that exceeds the tax base, the excess loss may be carried over to the following year for up to 10 years, or exhaustion of the loss, whichever occurs first. This is called a business loss deduction carryover. In 1992, the Department of Treasury issued a Revenue Bulletin 1992-3 (RAB 1992-3) stating its interpretation of the business loss deduction provisions of the SBTA. The revenue bulletin permits transfer of the business loss deduction carryover from a taxpayer that "completely ceases operations and is no longer a taxpayer under the single business tax act (SBTA)" to the taxpayer who acquires the assets of the transferor taxpayer.

First Industrial filed a single business tax return for 1998 in which it claimed a business loss deduction carryover in the amount of $149,207,916, the greater part of which was attributable to the business losses of FIFP, not First Industrial. After auditing First Industrial's tax returns for tax years 1998-2000, the Department of Treasury disallowed the business loss deduction carryover. Because FIFP did not "completely discontinue operations" as required by the revenue bulletin, the business loss deduction carryover from FIFP was not available to First Industrial, the department concluded. This ruling did not affect First Industrial's tax liability for tax year 1998, because it had sufficient business losses of its own to give it zero tax liability for that year. However, denying First Industrial the use of FIFP's business loss deduction carryover increased First Industrial's tax liability for tax years 1999 and 2000. The department assessed First Industrial additional tax of $567,354 for 1999 and $488,901 for 2000, together with interest of $356,589.18, for a total of $1,412, 844.18.

First Industrial paid the tax under protest, and then filed a lawsuit in the Court of Claims, seeking a refund. First Industrial argued that the business loss deduction carryover is available if the transferor entity completely ceases Michigan operations such that it is not subject to the Single Business Tax Act. In the alternative, First Industrial contended that it was entitled to take a capital acquisition deduction on the property that it obtained from FIFP. The Court of Claims ruled in favor of the department, ruling that First Industrial was not entitled to the carryover because the phrase "completely discontinues operation" in RAB 1992-3(3)(E) requires total cessation of operations, not merely cessation of business in Michigan. The Court of Claims also rejected First Industrial's capital acquisition deduction claim because First Industrial had failed to show that it paid or accrued any cost for acquiring the property.

In an unpublished per curiam opinion, the Court of Appeals reversed the Court of Claims regarding the business loss deduction, but affirmed regarding the capital acquisition deduction. The Court of Appeals agreed with First Industrial that the phrase "completely discontinues operation" should be limited to Michigan operations because the Single Business Tax Act only applies to taxpayers who have economic activity in Michigan. With respect to the capital

acquisition deduction, the Court of Appeals agreed with the department and the Court of Claims that, because First Industrial had not proven any paid or accrued cost for the acquisition of FIFP's property, the deduction was not available. Both parties appeal.

Wednesday, April 14
Morning Session Only

FRIEND v FRIEND (case no. 139165)
Attorney for plaintiff Alexander L. Friend: Thomas P. Casselman/(906) 228-2855
Attorney for defendant Julia D. Friend: Mark F. Haslem/(616) 742-6732
Attorney for amicus curiae Family Law Section of the State Bar of Michigan: Erika L. Salerno/(269) 324-3000
Attorney for amicus curiae Michigan Chapter of American Academy of Matrimonial Lawyers: Scott Bassett/(941) 794-2904
Trial Court: Houghton County Circuit Court
At issue: A divorcing couple agreed to joint legal custody of their two children, with the mother having physical custody and the father having visitation. But the children resisted visiting with their father – with the mother's encouragement, the father claimed. Although the trial court ordered counseling for the children to help them build a closer relationship with their father, the mother neither allowed visitation nor permitted the children to attend counseling. Instead, she challenged the divorce judgment in the Michigan Court of Appeals, and also asked the appellate court to have the case assigned to a different trial judge. While her appeal was pending, the trial court found the mother in contempt of court for her refusal to follow the court's orders and issued a warrant for her arrest; five months later, the Court of Appeals affirmed the trial court's rulings. The mother has appealed to the Michigan Supreme Court, but the father argues that, under the "fugitive disentitlement" doctrine, the mother is a fugitive from justice who cannot benefit from the appellate process. Did the trial court properly distribute the parties' property? Did the trial court err in its handling of parenting time issues and in ordering the children to attend counseling? Should the Court adopt the "fugitive disentitlement" doctrine?
Background: Alexander Friend and Julia Friend were married in 1982; the couple had two sons. On July 18, 2006, Alexander filed for divorce. He and Julia agreed to a stipulated court order that gave Julia physical custody of the children, and gave both of them legal custody. The court order also permitted Julie to relocate with the children to Charleston, South Carolina, and established a schedule for Alexander's visitation with his children. But the children resisted visitation with their father. Alexander claims that Julia secretly encourages the children to resist spending time with him.

The divorce proceeding was tried over four days in August 2007. The trial judge met with the children in chambers, and 15 witnesses, including two experts, testified regarding visitation and child support issues. Both experts recommended a short period of counseling for the children. While one expert recommended a normal visitation schedule, the other opined that, because the children were so resistant and fearful, normal visitation could only be accomplished "eventually." The court ruled that the key to addressing the children's fears of visiting their father was for the parents to make the children aware that they, as parents, respect each other and their parental roles. Julia was not willing to facilitate a relationship between the children and Alexander, the trial court concluded. The trial court did not disturb the parties' earlier stipulation regarding custody, but held that the children needed to receive counseling to help them build a

closer relationship with their father. The trial court ordered Julia to make the children available for counseling; in addition, Julia and Alexander were to follow a counseling regimen established by the doctor who would see the children, the court directed. The divorce judgment also provided that certain assets that Alexander had received as a gift and as an inheritance were his separate property. The judgment split the remainder of the parties' assets approximately equally, and required Alexander to make gradually decreasing spousal support payments to Julia over a five-year period.

Julia did not comply with the trial court's visitation schedule or allow the children to attend counseling. She appealed to the Court of Appeals, challenging the trial court's rulings on parenting time, spousal support, property distribution, and attorney fees; she also asked that the case be reconsidered by a different trial judge. Meanwhile, Alexander filed motions in the trial court, attempting to compel Julia to comply with the ordered visitation and counseling, but she continued to refuse. Eventually, the trial court found Julia in contempt of court and issued a warrant for her arrest. Five months later, the Court of Appeals affirmed the trial court's rulings in an unpublished per curiam opinion. Julia appeals to the Supreme Court, but Alexander has filed a motion to dismiss Julia's appeal based on the "fugitive disentitlement doctrine." Alexander argues that, because Julia is in contempt of court, she is a fugitive from justice and therefore cannot avail herself of the state's appellate process.

DUNCAN, et al. v STATE OF MICHIGAN, et al. (case nos. 139345-7)
Attorneys for plaintiffs Christopher Lee Duncan, Billy Joe Burr, Jr., Steven Connor, Antonio Taylor, Jose Davila, Jennifer O'Sullivan, Christopher Manies, and Brian Secrest: Michael J. Steinberg/(313) 578-6800, Mark R. Granzotto/(248) 546-4649
Attorney for defendants State of Michigan and Governor of Michigan: Ann Sherman/(517) 373-6434
Attorney for amicus curiae Retired Judges Giovan, O'Hair, and Burress: William J. Giovan/(313) 964-1234
Attorney for amicus curiae Criminal Law Section of the State Bar of Michigan: Kimberly A. Thomas/(734) 647-4054
Attorney for amicus curiae Criminal Defense Attorneys of Michigan: Margaret S. Raben/(313) 628-4708
Attorney for amicus curiae National Association of Criminal Defense Lawyers, et al.: Mary M. Mullin/(313) 225-7000
Attorney for amicus curiae University of Michigan Innocence Clinic: Jason D. Menges/(313) 234-7100
Trial Court: Ingham County Circuit Court
At issue: This proposed class action suit is brought on behalf of all indigent criminal defendants in three Michigan counties, with the plaintiffs seeking to compel the state to provide increased oversight, funding, and training for attorneys who represent indigent defendants in criminal cases. The trial court certified the plaintiffs' class and ruled that the case can proceed; the Court of Appeals affirmed in a split published opinion. Does the relief requested by the plaintiffs violate the separation of powers? Are the plaintiffs' claims justiciable (capable of being resolved by a court)? Was the class action properly certified?
Background: The named plaintiffs in this lawsuit are eight indigent criminal defendants arrested in 2006 or 2007 who, at the time they filed suit, were under prosecution, but not convicted, in the counties of Berrien, Genesee and Muskegon. They sued the state of Michigan and the governor,

alleging constitutional violations of their right to effective or adequate legal representation and their right to due process, citing the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, §§ 17 and 20 of the Michigan Constitution of 1963. The plaintiffs assert that the state has a constitutional obligation to provide indigent criminal defendants with adequate counsel, and that the state, rather than local county funding units, must provide increased funding, oversight, and training for the attorneys who represent these defendants. The plaintiffs claim that the current system for proving indigent defense is poorly funded and inadequate, and has harmed them and others in various ways, including improperly denied representation, wrongful convictions, unnecessary detentions, factually unwarranted guilty pleas, and introduction of inadmissible evidence that could have been barred by pre-trial motions. The plaintiffs ask for a court ruling that the state's failure to provide adequate funding, supervision, and training has produced a system that is unconstitutional and unlawful. They also seek an injunction against the provision of inadequate counsel services, and they request an order requiring the state to "provide indigent defense programs and representation consistent with the requirements of the United States and Michigan Constitutions." Pursuant to MCR 3.501(B), the plaintiffs moved for class certification for all indigent criminal defendants in the three identified counties.

The defendants filed a motion for summary disposition, asking the court to dismiss the lawsuit. They argued that the plaintiffs lacked standing and that their claims were not ripe for adjudication. They also argued the trial court lacked jurisdiction over this matter because the legislature was the only proper entity to appropriate funds. Moreover, the defendants argued, the plaintiffs were improperly seeking prospective injunctive relief given their failure to show the absence of an adequate remedy at law and their failure to allege facts establishing a viable due process claim. In addition, the plaintiffs should have sued the respective counties and circuit courts where they were being prosecuted, not the state and governor, the defendants maintained. Finally, the defendants argued that the court lacked jurisdiction to issue injunctive relief against the governor, that governmental immunity barred the relief sought against the governor as to the plaintiffs' state constitutional claims, and that governmental immunity barred the claims brought against the state.

But the trial court ruled that the plaintiffs had the standing to make their claims and that the claims were ripe for judicial review. Because the claims sought prospective equitable relief, said the judge, the circuit court was the proper court to review them. The state was not "off the hook" just because it had delegated the responsibility for funding and administering indigent defense programs to the counties, the judge stated. The judge held that Michigan law cannot immunize the governor from state law claims for equitable relief, and that governmental immunity is not available in a state court action where it is alleged that the state has violated a right conferred by the Michigan Constitution. The judge also granted the plaintiffs' motion for class certification, defining the class as "[a]ll indigent adults who have been charged or will be charged with felonies in the District and Circuit Courts of Berrien, Genesee, and Muskegon Counties and who rely or will rely on the State to provide them with counsel for their defense."

The defendants appealed. In a split published decision, the Court of Appeals affirmed the rulings of the trial court. The majority held that the plaintiffs had stated claims that the judiciary had the authority to address and that class certification was appropriate for these claims. The defendants were not shielded by governmental immunity, but were proper parties to the lawsuit; the circuit court has jurisdiction and authority to order declaratory and injunctive relief if the plaintiffs succeed in proving their allegations, the majority said. The dissenting judge concluded

that the majority's pronouncements violated clear separation of powers dictates. "I am not a member of the Legislature," said the dissenting judge. "I am a member of an intermediate error-correcting court, not a policy-setting one." The defendants appeal.

PEOPLE v DUPREE (case no. 139396)
Prosecuting attorney: Joseph A. Puleo/(313) 224-5748
Attorney for defendant Roberto Marchello Dupree: Kevin S. Ernst/(313) 965-5555
Trial Court: Wayne County Circuit Court
At issue: The defendant was charged with assault-related crimes, felon-in-possession of a firearm, and felony-firearm. He claimed that he acted in self-defense, and that the gun accidentally discharged as he attempted to wrestle it away from the man who was attacking him. The defendant said that he threw away the gun as he drove from the scene. He was acquitted of all charges except felon-in-possession of a firearm. He argued on appeal that common law defenses of duress and self-defense are available to the charge of felon in possession, and that the trial court's jury instructions denied him a fair trial. The Court of Appeals agreed. Are the common law defenses of self-defense, necessity or duress applicable to the crime of possessing or carrying a firearm while ineligible to do so as a result of a prior felony conviction (felon in possession), MCL 750.224f? If so, does the defendant have the burden of proof to establish the defense?
Background: Roberto Dupree was arrested after he shot Damond Reeves three times at a party. Dupree and Reeves told very different stories about the events leading up to the shooting. According to Reeves and another witness, Dupree assaulted Reeves for no reason, pulled out a handgun, and then fired the shots that struck Reeves. According to Dupree and others, Reeves was drunk and became angry with Dupree; the two began to wrestle, and Dupree discovered that Reeves had a handgun in the waistband of his pants. Dupree said that he was afraid for his life, and that, as he attempted to wrestle the gun away from Reeves, the gun accidentally discharged three times. Dupree said that he kept the gun until he left the scene, and then threw the gun out the window of the car.

Dupree was arrested and charged with two counts of assault with intent to murder, felonious assault, and felony-firearm. He was also charged with being a felon in possession of a firearm, MCL 750.224f. With regard to the felon-in-possession charge, the court instructed the jury that Dupree would not be guilty if the jury believed his version of events and if Dupree did not keep the gun in his possession any longer than necessary to defend himself. Defense counsel objected to the second instruction, but the judge overruled the objection, telling the jury that Dupree could establish a momentary innocent possession defense if he could show that he intended to turn the weapon over to the police as soon as possible. The jury convicted Dupree of felon in possession of a firearm, but acquitted him of all the other charges. Dupree was sentenced as a fourth habitual offender to 48 months to 30 years in prison. He appealed to the Court of Appeals, claiming that the trial court's jury instructions denied him a fair trial.

In a split published opinion, the Court of Appeals reversed Dupree's conviction and remanded for a new trial. The majority held that a defendant may raise a justification defense to a charge of felon in possession. The defendant would have to show that he faced an unlawful and immediate threat that created an actual fear of death or serious bodily harm, that he took temporary possession of the firearm to avoid harm, and that he terminated his possession of the firearm at the earliest possible opportunity once the danger passed. The majority found that Dupree had not waived the issue and that the trial court's instructions wrongly required the jury

to find that Dupree intended to turn the weapon over to the police at the earliest possible time. The majority concluded that there was evidence in the record from which a reasonable jury could conclude that Dupree had terminated his possession of the weapon at the earliest possible opportunity. The dissenting judge would have held that Dupree did not properly raise these issues in the trial court. In addition, the dissenter found the error harmless because, even under Dupree's version of events, he did not terminate his possession at the earliest possible time. The prosecutor appeals.

BROOKS v STARR COMMONWEALTH, et al. (case no. 139144)
Attorney for plaintiff Sharon Brooks, Personal Representative of the Estate of Dominique Wade, Deceased: Mark R. Granzotto/(248) 546-4649
Attorneys for defendant Starr Commonwealth: D. Randall Gilmer, G. Gus Morris/(248) 502-4000
Trial Court: Oakland County Circuit Court
At issue: A juvenile with a history of violent behavior escaped from defendant's non-profit medium security residential facility near Albion. After making an unsuccessful search, the defendant's staff reported the escape to the county sheriff. MCL 803.306a(1) requires a facility such as defendant to "immediately" notify police or the sheriff of an escape. Eleven days after his escape, the juvenile murdered a man in Pontiac. The murder victim's estate sued the defendant, alleging negligence per se as a result of the statutory violation. The trial court dismissed the lawsuit, but the Court of Appeals reversed and reinstated the negligence per se claim. Did the defendant breach a duty owed to the plaintiff or the decedent? Can the plaintiff establish proximate cause?
Background: Starr Commonwealth is a private non-profit organization that operates a medium security residential program for juvenile offenders near Albion. In July 2002, Michael Kirksey, then 16 years old, was assigned to Starr's program; he had a history of violent behavior, including assaults with weapons. In his first two months at the facility, Kirksey escaped three times, but was found and returned each time. A case manager recommended transferring Kirksey to a high-security facility. On September 1 at about 10:30 p.m., Kirksey escaped from the Starr facility again, accompanied by three other youths. Starr Commonwealth staff discovered the escape at 10:38 p.m. After an unsuccessful search, Starr staff notified the Calhoun County Sheriff Department at 12:19 a.m. The three other juveniles were either apprehended or returned voluntarily. Eleven days after his escape, Kirksey shot and killed Dominique Wade in Pontiac, about 100 miles from Starr's facility. He was tried as an adult and convicted of murder.

Sharon Brooks, personal representative of Wade's estate, sued Starr in 2005. Brooks alleged that Starr owed a duty to the general public outside its facility; Starr was negligent in failing to prevent Kirksey's escape and in failing to immediately notify law enforcement, Brooks maintained. Brooks' complaint included a count of negligence per se – a claim that a defendant has violated a public duty, such as driving within the speed limit. MCL 803.306a(1)(b)(i) of the Youth Rehabilitation Services Act requires a facility to "immediately notify" the municipal police department, county sheriff, or State Police when a public ward escapes from the facility. Brooks claimed that Starr's delay in contacting police violated the statute's "immediate" notice provision; by the time Starr notified the county sheriff, Kirksey had already fled to Detroit, Brooks contended. But the trial court dismissed the negligence per se count. The judge said that, although Starr's delay in contacting authorities did violate MCL 803.306a(1)(b)(i), Brooks' negligence per se claim failed anyway, because she could not show that Starr owed her or Wade

a duty, or that Starr's violation of the statute was the proximate cause of Brooks' loss. The judge pointed out that Wade's murder occurred 11 days after Kirksey's escape; the intentional murder was an intervening superseding cause that cut off any liability Starr might otherwise have, the judge reasoned.

In a split unpublished per curiam opinion, the Court of Appeals reversed and remanded the case to the trial court for further proceedings on Brooks' negligence per se claim. The panel explained that, "[i]n light of the fact that the immediacy requirement of the statute was designed to prevent harm to the public, and [Brooks] was within the class to be protected, the issue is one for the jury." The dissenting judge would have affirmed the trial court's dismissal of the negligence per se claim. Starr appeals.

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